Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-191

GEORGE E. FASSNACHT
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

On Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF OF AN AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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CONSIDERATION FOR THE BRIEF OF AN AMICUS CURIAE

The National Rifle Association of America respectfully files with this Court a brief, amicus curiae, in support of the petitioner in the instant case. This filing is made pursuant to Rule 42 of the Supreme Court Rules. Both counsel for the petitioner and the respondent have consented to this filing and a letter from each has been filed with the Clerk of this Court. The interest of the amicus curiae and our reasons for filing are set forth below.

INTEREST OF THE AMICUS CURIAE

The National Rifle Association of America is a national non-profit sportsmen's organization incorporated under the laws of the State of New York. As stated in its bylaws, among the purposes and objectives of the National Rifle Association of America are:

> "1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
>
> 2. To promote public safety, law and order, and the national defense".

In the furtherance of these objectives, the National Rifle Association of America seeks to represent in all forums and courts nationwide, the concern of the citizenry with the issues affecting the foregoing rights regarding ownership and use of firearms.

This case, involving as it does both questions of statutory construction and the law of forfeitures, will have a major impact on gun collectors, owners and hobbyists throughout the nation.

Accordingly, amicus respectfully considers it important for this Court to exercise its discretionary authority and grant the petitioner's request for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

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ARGUMENT

I. THE SUPERIOR COURT OF PENNSYLVANIA ERRONEOUSLY CONCLUDED THAT PETITIONER WAS AN UNLICENSED DEALER IN VIOLATION OF THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 921(a)(11).

Amicus will not reiterate the legal arguments made by the petitioner in the instant case, although we agree with them and wish to associate ourselves with them and petitioner's statement of the case. We will confine our argument to the pragmatic issues relating to the Gun

Control Act of 1968, Public Law 90-618, 18 U.S.C. § 921 *et seq.*; its purposes and standards; and, in particular, what acts, deeds or conduct will subject a firearms collector and owner to be classified as a "dealer" of firearms, pursuant to the applicable licensing requirements of 18 U.S.C. § 921 *et seq.*

The instant case, while a civil forfeiture as opposed to a criminal proceeding, is yet another in a line of cases in which the courts have been called upon to review the statutory construction of the Gun Control Act of 1968. As to this case, the applicable sections are:

> 18 U.S.C. § 921: *Definitions*
>
> a. As used in this Chapter:
>
> (11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this Chapter.
>
> 18 U.S.C. § 922: *Unlawful Acts*
>
> a. It shall be unlawful—
>
> (1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce,

The operative words are "engaged in the business of selling . . . repairing . . . or pawn[ing]" firearms and ammunition. Numerous U.S. Circuit Courts of Appeal have been called upon to interpret this phrase.

But while the instant case is merely another in the line of cases demanding construction of 18 U.S.C. § 921 (a) (11), it differs from *all* the others in that here, there is no evidence of a sale, or an allegation of a sale, or attempted sale of firearms by the petitioner. In each and every one of the other cases the defendant had been found to be an "unlicensed dealer" because of, or in addition to, sales of firearms.

The standard for defining a dealer was first enunciated in *United States* v. *Gross*, 451 F.2d 1355, 1357 (7th Cir. 1971), in which the court held that " 'business' requires time, attention, and labor for the purpose of livelihood or profit". *Accord, United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973); *United States* v. *King*, 532 F.2d 505 (5th Cir. 1976); *United States* v. *Williams*, 502 F.2d 581 (8th Cir. 1974); *United States* v. *Wilkening*, 485 F.2d 234 (8th Cir. 1975); *United States* v. *Powell*, 513 F.2d 1249 (8th Cir. 1975); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975). *United States* v. *Jackson*, 325 F. Supp. 672, 674 (S.D. Ohio 1972), *aff'd*, 480 F.2d 927, more strictly defined this standard by holding that "anyone is engaged in the business of dealing in firearms if they have guns on hand . . . with the *purpose* of selling some or all . . ." [emphasis added]. In *United States* v. *Williams*, 502 F.2d 581, 583 (8th Cir. 1974), the court said flatly: " 'engaging in business' [means that] . . . there could be no doubt in the minds of men of common intelligence that 'dealer' means one that is engaged in any business of *selling* firearms . . ." [emphasis added]. *Accord, United States* v. *Baker*, 397 F. Supp. 1122 (E.D. Mo. 1975). Therefore, "engaged in the business" has been interpreted to mean "engaged in the business of selling". Clearly the petitioner, as evidenced by the record herein, did not sell firearms. His conduct could not rationally be construed as promoting an activity whose *purpose* was the sale of firearms or ammunition.

If there is no evidence that a collector or owner of firearms has engaged in sales of firearms, then based on the *Gross* and *Williams* cases, to determine that one is a dealer becomes most difficult, if not totally arbitrary. Statutory construction of the term "engaged in the business" becomes far more difficult. Without the element of a sale or profit from the sale of firearms, what then is the Government's standard? We think there is no adequate standard without these crucial elements and that the term "dealer" in this context has little meaning without them. However, in a leading case on this point, *United States* v. *Huffman*, 518 F.2d 80, 81 (4th Cir. 1975), the court stated: "Thus while the Government need not prove an actual profit from sales of firearms, *it must show a willingness to deal*, a profit motive, and a greater degree of activity than occasional sales by a hobbyist" [emphasis added]. We believe this to be a sound approach; and we submit that it is in the context of just such a realistic approach that petitioner's case should be judged. Therefore, accepting the minimum standard thus far judicially propounded, the Government must show a "willingness to deal" and some profit motive by a preponderance of the evidence. The record of the instant case demonstrates that the Superior Court of the State of Pennsylvania concluded the petitioner was an "unlicensed dealer" based solely on the testimony of one Bureau of Alcohol, Tobacco, and Firearms agent. The testimony of the agent included personal comments and conclusions completely unsubstantiated in fact or practice, to the effect that the quantity and packaging of the seized firearms were consistent with dealership. To arbitrarily apply the term "unlicensed dealer" based on personal observations of, for example, the quantity of firearms possessed or the "nature, quality, and manner of storage" of such firearms is contrary to aforementioned case law and inconsistent with, and contrary to

the intent of the drafters of the Gun Control Act of 1968 (P.L. 90-618).

To determine the meaning and intent of the Gun Control Act of 1968 we need look no further than the law itself. Section 101 of Public Law 90-618 provides that:

> "The Congress hereby declares that the purpose of this title [which amended 18 U.S.C. § 921] is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is *not* the purpose of this title to place any undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is *not* intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those *reasonably* necessary to implement and effectuate the provisions of this title" [emphasis added].

To subjectively apply an "unlawful act" label on conduct which, by itself, is lawful (i.e. the collection of firearms) is both self-defeating of the stated purposes of the law and self-serving of the limited aims of the government here, which was to insure forfeiture of firearms, following an illegal seizure of said firearms by the Philadelphia police. Plainly, this law was not intended to be subverted so that a "collector" could be arbitrarily determined a "dealer". The ramifications of the lower court's holding in the instant case is certain to achieve exactly the opposite of the law's purpose: a discouragement of the private possession of firearms.

The forfeiture of petitioner's property could be accomplished only by a finding that the property was con-

traband per se and that a return of the seized items to petitioner would "enable him to resume deealing in them". Generally forfeitures are not favored and "should be enforced only when they are within both the letter and the spirit of the law." *Epps* v. *Bureau of Alcohol, Tobacco and Firearms*, 375 F. Supp. 345, 348 (E.D. Tenn. 1972), *aff'd*, 495 F.2d 1373 (6th Cir. 1973). In *United States* v. *1922 Assorted Firearms*, 330 F. Supp. 635 (E.D. Mo. 1971), the court held that without a showing of a wrongful intent to violate either the law or any regulations, the forfeiture of one's entire stock of firearms and ammunition is unwarranted. With a showing of wrongful intent, only those items directly related to the unlawful act would be subject to forfeiture. Here the petitioner never violated, or intended to violate, the law or regulations. The decision of the Superior Court in relying on the licensed dealer requirements to support the forfeiture was incongruous at best.

In involved and complex matters of interpretation and statutory construction a certain degree of flexibility is necessary. Care should be taken to strike a fine balance between the rights of society in general and the rights of the individual in particular. In such cases as this, involving forfeiture only, in which the good faith of the owner was actually demonstrated, and no unlawful conduct shown, a strict approach with emphasis on individual rights, rather than a balancing test, should be applied.

This case contains four crucial elements: (1) admitted denial of the petitioner's Fourth Amendment rights in the search and seizure of his personal property; (2) a resulting suppression of the evidence of the search and seizure; (3) the attachment of an "unlawful act" to an act which, by itself, is wholly lawful; and (4) a resulting forfeiture of petitioner's valuable personal property.

We urge the Court to review the decision of the Superior Court of Pennsylvania because its decision to uphold the forfeitures by engaging in, and utilizing, an artificial standard for defining a dealer is contrary to the intent of the Gun Control Act of 1968, and contrary to the foregoing cited federal decisions. This decision establishes a harmful precedent which cannot be allowed to stand. The harm is the potential use of this precedent by state and/or federal investigative agencies to institute excessive civil forfeitures and criminal proceedings against lawful firearms owners and collectors.

CONCLUSION

The facts and law regarding this case demonstrate that the petitioner has been denied his property based on a decision that is contrary to established federal law. Based on the foregoing, we respectfully urge this Court to grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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